

United States Department of the Interior
Office of Hearings and Appeals
139 East South Temple, Suite 600
Salt Lake City, Utah 84111

April 25, 2000

CALIFORNIA TRUST REFORM	:	IBIA 98-112-A
CONSORTIUM,	:	
	:	Appeal of a March 16, 1998, decision issued
Appellant	:	by the Director, Office of Trust Funds
	:	Management, Office of the Special Trustee
v.	:	for American Indians
	:	
DIRECTOR, OFFICE OF TRUST	:	Indian Self-Determination Act, 25 U.S.C.
FUNDS MANAGEMENT, OFFICE	:	§§ 450-450n
OF THE SPECIAL TRUSTEE FOR	:	
AMERICAN INDIANS,	:	
	:	
Appellee	:	

AMENDED RECOMMENDED DECISION

Appearances: Cynthia Williamson, Redding, California, for Appellant

Patti Jamison, Esq., Washington, D.C., for Appellee

Before: Administrative Law Judge Nicholas T. Kuzmack

On April 19, 2000, a Recommended Decision was issued granting Appellee's Motion for Summary Judgment and denying Appellant's Motion for Summary Judgment, as stated in the Conclusion on page 6. The third sentence on the first page of that Recommended Decision incorrectly states that "Appellant's Motion for Summary Judgment is granted and Appellee's Motion for Summary Judgment is denied" when, in fact, it should have stated "Appellee's Motion for Summary Judgment is granted and Appellant's Motion for Summary Judgment is denied." This Amended Recommended Decision is issued to correct that typographical error and supercedes the Recommended Decision. No other changes have been made to the Recommended Decision, except to change the phrase "Recommended Decision" to "Amended Recommended Decision" in some instances.

This Amended Recommended Decision addresses pending motions for summary judgment filed by both parties. The parties took advantage of the ample opportunity afforded

them to submit briefs regarding the motions and they are now ripe for decision. For the reasons set forth below, Appellee's Motion for Summary Judgment is granted and Appellant's Motion for Summary Judgment is denied.

Statement of Facts

Appellant is a consortium of seven California tribes formed for the purpose of submitting a contract proposal to the Department of the Interior, under the Indian Self-Determination and Education Assistance Act (ISDA), to develop a demonstration project for reform of trust resources management. Appellant submitted such a contract proposal, along with a cover letter dated December 15, 1997, to two components of the Department of the Interior: the Sacramento Area Office (SAO), Bureau of Indian Affairs (BIA), and the Office of the Special Trustee for American Indians (OST). In the proposal Appellant proposed "to contract the trust resource reform component of the Special Trustee in order to fund a five[-] year demonstration project whereby the participating tribes will develop a true partnership with the Sacramento Area Office (SAO), and together assume the responsibilities for trust management reform, developing a model which can be utilized by other tribes throughout the United States."

The OST declined to approve the proposal in a letter dated March 16, 1998, which was faxed to Appellant that same day. The BIA never issued documentation approving or declining the proposal. Without specifically addressing the BIA's inaction, the letter provides the reason for the BIA's inaction and deferral to the OST to respond to the proposal: that the OST is responsible and initially receives all funding for trust management reform. The letter states, "It is assumed that the [proposal] was submitted to both [the BIA and the OST] with the understanding that appropriations for trust reforms will be made to the Special Trustee and subsequently allocated to the BIA for specific reforms."

The OST issued the declination "based primarily on 25 CFR 900.22(d) 'The amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 106(a) of the [ISDA].'" Referencing the Strategic Plan for trust management reform submitted by the OST to the Secretary on April 11, 1997, the declination letter explains:

While the Special Trustee's Strategic Plan, outlined in general terms, the needed reforms in BIA's management of trust resources, no funds have been requested in the Department's budget, and no appropriations have been made for those purposes, except those to begin the process of identifying and acquiring a state-of-the-art asset management system to be used nationwide. There are no funds as yet appropriated or authorized for improvement of on-

the-ground management processes and practices. Therefore, there simply are no funds provided by the Secretary for the purposes described in your [proposal].

No other ground for declination was specified in the March 16, 1998, letter.

Pursuant to the request of Appellant, an informal meeting between the parties was held on April 15, 1998, to discuss the declination. On June 10, 1998, the OST issued a letter to Appellant recommending confirmation of the declination decision. On July 7, 1998, Appellant filed its Notice of Appeal.

The June 10, 1998, letter notes that the “declination was based on the fact that there is no program and therefore no funding for such program within the Office of the Special Trustee which matches the activities described in the Consortium’s proposal.” The letter concludes that “[t]here is no portion of your proposal which could be funded from this Office’s currently authorized fiduciary improvement efforts now underway.”

Discussion

Under the ISDA and its implementing regulations, the Secretary is directed, upon the request of any Indian tribe, to enter into a self-determination contract with the tribe so that the tribe may plan, conduct, and administer programs, functions, services, and activities (PFSA's) administered by the Secretary for the benefit of the tribe. See 25 U.S.C. § 450f and 25 C.F.R. Part 900. Upon the request of a tribe, the Secretary shall also provide technical assistance to the tribe to develop a new contract proposal or to provide for the assumption of the PFSA's by the tribe. 25 C.F.R § 900.7. The Secretary must approve a contract proposal and award the contract within 90 days after receipt of the proposal unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that (or that is supported by a controlling legal authority that) one or more of five specific reasons for declination exist, together with a detailed explanation of the reason(s) for the declination and, within 20 days, provides any documents relied on in making the decision. See 25 U.S.C. §§ 450f(a)(1); (a)(2); 25 C.F.R. §§ 900.21, 900.22, 900.29.

The Secretary may decline to contract only if he makes a specific finding that one or more of five statutorily and regulatorily delineated reasons exist for declination. 25 U.S.C. § 450f(a)(2); 25 C.F.R. §§ 900.21, 900.22. The Secretary must approve any severable portion of a proposal that does not support a declination finding. 25 U.S.C. § 450f(a)(4); 25 C.F.R. § 900.25. With respect to those portions which are declined, the Secretary must provide technical assistance to overcome the stated reasons for declination and must provide any necessary requested technical assistance to develop any modifications to overcome the reasons for declination. 25 U.S.C. §§ 450f(b)(2), 450h(d); 25 C.F.R. § 900.30.

With regard to the Appellant's proposal, "the Secretary has the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portions thereof)." 25 U.S.C. § 450f(e)(1); accord, 25 C.F.R. § 900.163. The legislative history of 25 U.S.C. § 450f(e)(1) and the preamble to the implementing regulation, 25 C.F.R. § 900.163, indicate that the "clearly demonstrates" standard is an intermediate standard that is higher than a "preponderance of the evidence" standard but lower than a "clear and convincing evidence" standard. See 140 Cong. Rec. H11140-01, H11142-43; 140 Cong. Rec. S14677-02; 61 Fed. Reg. 32,482, 32,497 (June 24, 1996).

Appellee correctly points out in its motion that the ISDA is a mechanism for tribes to assume the operation of programs which the Federal government is otherwise providing at the funding level which the Federal government would otherwise provide. See 25 U.S.C. §§ 450b(j), 450f(a)(1), 450j-1(a). It argues that it properly declined Appellant's proposal because the Department is not otherwise providing, conducting, or funding a demonstration project for trust management reform.

Appellant counters that monies are available to fund its proposal because the Secretary has already allocated some funds for trust management reform, that most or all of the activities to be conducted under the proposed demonstration project, such as gathering information for trust transactions, are the types of activities which are already being conducted by tribes under ISDA contracts, including the tribes which comprise Appellant, and that Appellee should have provided technical assistance to Appellant to overcome any objectionable portions of its proposal. It argues that Appellant violated both the consultation and information disclosure requirements of 25 C.F.R. part 900. It concludes with a request

that OST's declination of the Consortium's Proposal be reversed on the basis of failure to fulfill the requirements of Part 900; the Proposal should be awarded in full by the BIA for failure to decline the proposal; or OST/BIA should provide the technical assistance to negotiate an award of the Proposal with the Consortium as required in Part 900.

Appellant's focus on the types of activities which would be conducted under the proposed demonstration project misses the mark. The critical factor is the purpose of the proposal. That purpose is to "contract the trust resource reform component of the Special Trustee in order to fund a five[-]year demonstration project."

While the Secretary has allocated some funds for trust management reform from OST's lump-sum appropriation, he has never decided to initiate or fund such a demonstration project. It is the Secretary's prerogative to determine how the lump-sum appropriation will be allocated. See, e.g., Lincoln v. Vigil, 508 U.S. 182, 190-95 (1993). David A. Gilbert, the Budget Officer for the OST, has sworn under penalty of perjury that "OST does not use and

has never used its appropriations to fund a trust reform demonstration project as envisioned by Appellant that can be assumed under an Indian Self-Determination Act contract.”

There is nothing in the ISDA which requires the Secretary to create and fund a program for which Appellant may then contract. See Native American Center of Recovery v. Indian Health Service, Decision No. CR 293 (HHS Departmental Appeals Board, 1993). Appellee is correct in arguing that Appellant may not use the ISDA as a vehicle to usurp the Secretary’s power to decide which trust management reform programs are appropriate and how funds will be allocated for those programs.

Had Appellant simply proposed to contract for such activities as the gathering of information for trust transactions, or had Appellant made its proposal under circumstances where the Secretary had already determined to initiate and fund such a demonstration project, the result may well have been different. However, Appellant’s proposal is not so simple and was not made under such circumstances; it is a proposal for a trust management reform program which the Secretary would not have otherwise provided and funded, at least to date.

Appellee is also correct in noting that the Secretary is not required to provide technical assistance where, as here, the contract proposal deficiency cannot be rectified by technical assistance. See Nizhoni Smiles v. Indian Health Service, DAB No. CR450, Docket No. C96-029 (December 19, 1996); California Rural Indian Health Bd. v. Indian Health Service, DAB No. CR273, Docket No. C-93-013 (June 23, 1993). No information or assistance could have been provided to overcome the deficiency that Appellant proposed to contract for a program that the Secretary did not otherwise provide or fund. Any modification of the proposal to overcome this deficiency would conflict with the stated purpose of the proposal.

Nor does the allegation of failure to comply with the information disclosure requirements of the ISDA justify a grant of summary judgment in Appellant’s favor. Whether or not those disclosure requirements were met, the fact remains that Appellant’s proposal could not be granted nor could its deficiency be cured.

The fact that the BIA did not approve or decline the proposal is immaterial because the OST, acting for the Secretary, did act to decline it. It is the Secretary who must decline the proposal within the 90-day time limit in order to avoid automatic approval of a proposal. The Secretary did so through his delegate, the OST. The Secretary was not required to act twice, through two different delegates (the BIA and the OST), to avoid application of the automatic approval provision.

The Appellant has also challenged the timeliness of the declination letter, although that challenge does not appear in Appellant’s motion for summary judgment. Appellant has argued that the proposal was received by the OST on December 16, 1997, that Appellant did not receive the declination letter until 91 days after the OST received the proposal, and

therefore that the proposal should be deemed approved under the automatic approval provision (25 C.F.R. § 900.18) because Appellee did not provide written notification of the declination with 90 days of receipt of the proposal, as required by 25 U.S.C. § 450f(a)(2) and 25 C.F.R. § 900.16.

The date stamp on the proposal indicates that it was received on December 17, 1997, not December 16, 1997. Even if it was received by the Department on December 16, 1997, the 90th day thereafter would be March 15, 1998, which was a Sunday. The regulations provide, “where the last day of any time period falls on a Saturday, Sunday, or Federal holiday, the period shall carry over to the next business day unless otherwise prohibited by law.” 25 C.F.R. § 900.6. Therefore, the deadline for declining the proposal carried over to the next business day, March 16, 1998, which is the day that the OST faxed its declination letter to Appellant. Consequently, written notification of the declination was timely provided to Appellant.

Conclusion

Based upon the foregoing, the Appellee’s Motion for Summary Judgment is granted and the Appellant’s Motion for Summary Judgment is denied.

Nicholas T. Kuzmack
Administrative Law Judge

APPEAL INFORMATION

Within 30 days of the receipt of the Amended Recommended Decision, you may file an objection to the Amended Recommended Decision with the Interior Board of Indian Appeals (IBIA) under 25 C.F.R. § 900.165(c). An appeal to the IBIA under 25 C.F.R. § 900.165(c) shall be filed at the following address: Interior Board of Indian Appeals, 4015 Wilson Boulevard, Arlington, VA 22203. You shall serve copies of your notice of appeal on the Secretary of the Interior, and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies. If neither party files an objection to the Recommended Decision within 30 days, the Recommended Decision will become final.